APPEAL NO. 020462
FILED APPEAL 17, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 17, 2002. The hearing officer held that the respondent (claimant) sustained a compensable injury on _____; that the appellant (carrier) did not timely contest the compensability of this injury and did not prove that its delayed reopening of compensability resulted from newly discovered evidence that could not have reasonably been discovered at an earlier date; that the claimant's compensable injury was a "producing cause" of the condition for which knee surgery was recommended; and that the claimant had disability from this injury beginning October 11, 2001, through the date of the CCH.

The carrier appeals, arguing that producing cause is not a proper standard for evaluating extent of injury. The carrier argues that the hearing officer erred in holding that its defense was not based on newly discovered evidence. The carrier points out that the evidence indicates there were several other incidents more likely to have caused injury. There is no response from the claimant.

DECISION

Affirmed in part, reversed and remanded in part.

The claimant contended that on _____, as he pushed and pulled a soil compactor, he felt his left knee pop. Assuming it was "old age," he continued to work for two and one-half hours, then went home for lunch. While leaving his home to return to work, his left knee locked and he fell forward, hitting his right knee. When the claimant returned to work, he reported the injury, and an argument ensued over whether he was hurt at work or not. The claimant said that he went to the emergency room the next day, where he was diagnosed with a sprain, and his knee was observed to be swollen. He is reported as saying he was shoveling dirt when his knee popped. The claimant said he was terminated by the employer the next day when he returned to work with his restrictions.

He was subsequently sent to the employer doctor's clinic by the safety director and again diagnosed with a knee sprain. The claimant continued to work for a sequence of employers, with only a few visits to his doctor. There appeared to be a gap in his medical treatment between July 19 and October 1, 2001. The claimant, who contended he could not recall dates, was unclear on whether he saw a doctor in that time frame. An MRI done in mid-October showed a torn meniscus for which surgery has been recommended.

The claimant agreed he had been working for a roofer on April 19, 2001, and had fallen from a roof, hurting his left knee. He denied he was hospitalized for this although he was treated at a hospital. The emergency room records show that no bruising or swelling was noted, and he was diagnosed with a sprain and was splinted. No workers' compensation claim was filed because the employer was not insured. The claimant

received treatment through private health insurance and said that after a few days of elevating the knee and icing it, it was fine.

The carrier did not interview the claimant about the injury until November 6, 2001. The claimant was asked whether he had filed any previous injury claims, workers' compensation or otherwise. He identified only a motor vehicle accident several years before. He was asked about hospital treatment for injuries and identified such treatment for high blood pressure, his appendix, his back, cut fingers, and a toothache. The claimant told the adjuster that prior to the _____, incident, his knees had never given him trouble.

WAIVER AND NEWLY DISCOVERED EVIDENCE

The carrier received written notice of a left knee injury on June 28, 2001, from the Texas Workers' Compensation Commission (Commission). The claimant's recorded statement was taken for the first time on November 6, 2001. There was no dispute that prior to this date, the carrier had not disputed the claim nor filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) until November 2001, after the claimant's statement was taken. The hearing officer announced that he was taking official notice of the TWCC-21, but regrettably a copy was not included in the record. During discussion on the matter, the carrier argued that it was not basing its newly discovered evidence claim on the defenses in the TWCC-21, but on a verbal dispute filed at the December 2001 benefit review conference, when it ostensibly became aware for the first time that the claimant had been injured when he fell from the roof in _____. The carrier's argument is that although a delayed investigation of the claim was made, the claimant lied about any previous injuries, and likely would have lied if he had been interviewed timely. Therefore, its discovery of the April accident was "newly discovered" in December.

We cannot agree with this logic. Senator Montford, in A Guide to Texas Workers' Comp Reform, notes the objective of promptness in investigating a claim:

> Commentary, Section 5.21 . . . As compared to the prior comp law, Section 5.21 [***now Section 409.021, Texas Labor Code***] significantly accelerates processing time for carriers either to initiate benefit payments . . . or to contest compensability. Promptness of the initial comp payment was considered an important reform objective since delays in initiating benefits under the prior law at times resulted in hardship upon the employee and/or a need (viewed from the employee's perspective) for early attorney involvement.

In this case, the dispute to contest the occurrence of a _____, injury was waived pursuant to Section 409.021(c), when the 60th day after written notice passed without dispute by the carrier. It was then required, under Section 409.021(d) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3(a)(3) (Rule 124.3(a)(3)), to base its dispute

on newly discovered evidence. The Appeals Panel has stated that the fruits of a deferred investigation of a claim do not constitute "newly discovered" evidence. Texas Workers' Compensation Commission Appeal No. 992365, decided December 6, 1999; Texas Workers' Compensation Commission Appeal No. 000697, decided May 22, 2000. We note that the evidence identified here as new was brought forward within 60 days of the interview with the claimant, demonstrating that had the investigation been conducted promptly, the need to rely on such "new" evidence would not have arisen. The hearing officer's determination that the carrier may not relitigate the occurrence of an injury on _____ (having accepted compensability thereof) is supported by the record.

EXTENT OF INJURY

The waiver problem does not, however, resolve the extent-of-injury issue central to this case. While the hearing officer wrote a conclusion of law that the _____, compensable injury was a "producing cause" of the claimant's left knee surgical condition, the carrier correctly points out that the hearing officer made no findings of fact on a causal connection between a knee sprain and the torn meniscus. He found only that the _____, injury was not the sole cause of current conditions, leaving unaddressed the evidence of any subsequent occurrences or employments and their role in causation.

Effective March 13, 2000, the Commission promulgated Rule 124.3(c), stating that subsection (a) of the rule does not apply to disputes over the extent of an injury. Rule 124.3(a) includes provisions for disputing the injury within 60 days of written notice as well as reopening compensability based upon newly discovered evidence. Therefore, although the hearing officer properly held that the carrier here had waived the right to dispute that the claimant did not injure his knee on _____, but had been injured instead on _____, the rule makes clear that the carrier did not similarly waive the right to dispute the causal connection of the torn meniscus to the _____, injury.

We do not agree with the carrier's argument that producing cause is not an aspect of analyzing extent of injury, and the Appeals Panel has several times applied the producing cause standard. However, our ability to imply a fact finding of a causal connection between the _____, compensable injury and the current torn meniscus is complicated by two aspects of the decision: the hearing officer in his discussion characterizes the _____, knee injury as a "minor" one, and he further finds and repeats that the carrier waived the ability to "contest the claim" in such a way as to suggest that the carrier has also waived a dispute to the extent of the compensable knee injury. Moreover, the hearing officer questions the credibility of the claimant several times in his decision. Because the decision indicates that the hearing officer applied waiver to the extent-of-injury issue, as well as the _____, injury, we remand for further consideration of the evidence and findings of fact.

We note that while the hearing officer discusses that the claimant's knee problems were most likely "related" to the April accident and "may have been aggravated" by the _____, incident, nothing is discussed relative to the subsequent employments or

injuries (including the fall down the steps at home on the same day) that the claimant incurred, again underscoring application of a waiver doctrine to the extent issue.

DISABILITY

The claimant was taken off work as a result of his torn meniscus (and not due to a knee sprain) after October 11, 2001. Because the disability finding depends upon resolution of the extent issue, we would only note at this time that there is sufficient evidence to support the hearing officer's finding that the current left knee injury has resulted in the inability to work beginning October 11, 2001.

A copy of the TWCC-21 should be included in the record on remand, as it was officially noticed. Findings of fact should be made on the extent-of-injury issue in accordance with our holding that a dispute over extent was not waived. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **NORTHERN INSURANCE COMPANY OF NEW YORK** and the name and address of its registered agent for service of process is

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Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Terri Kay Oliver
Appeals Judge